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MONTHLY ELECTRONIC SUBROGATION NEWSLETTER **MARCH 2010**

TO CLIENTS AND FRIENDS OF MATTHIESEN, WICKERT & LEHRER, S.C.:

This monthly electronic subrogation newsletter is a service provided exclusively to clients and friends of Matthiesen, Wickert & Lehrer, S.C. The vagaries and complexity of nationwide subrogation have, for many lawyers and insurance professionals, made keeping current with changing subrogation law in all fifty states an arduous and laborious task. It is the goal of Matthiesen, Wickert & Lehrer, S.C. and this electronic subrogation newsletter, to assist in the dissemination of new developments in subrogation law and the continuing education of recovery professionals. If anyone has co-workers or associates who wish to be placed on or removed from our e-mail mailing list, please provide their e-mail addresses to Rose Thomson at rthomson@mwl-law.com. We appreciate your friendship and your business.

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WORKERS' COMPENSATION SUBROGATION

THIRD-PARTY LITIGATION IN CONSTRUCTION SETTINGS

By Gary L. Wickert

American workers' compensation carriers are preoccupied with preventing occupational injuries and deaths - and for good reason and with palpable results. The National Institute for Occupational Safety and Health (NIOSH), the Center for Disease Controls' occupational arm which monitors occupational injuries and deaths in the American workplace, reports that over the last 20 years, occupational injuries and deaths are on the decline. However, accidents do happen. For more than 90 years, American insurers have depended, relied, and calculated premiums on the expectation that if a third party other than the worker's employer is responsible for the employee's injuries, the compensation carrier will be able to subrogate the loss and shift the ultimate responsibility for paying the loss onto the party responsible for causing the loss in the first place.

Employers also rely on subrogation in occupational settings in order to help keep the experience modification factors and in retrospective ratings, and consequently their premiums, low. Employers with retrospective rating plans or retention plans literally depend on subrogation to help reflect their true loss history. Unfortunately, our industry has not done enough to sing the praises and designed social benefits of subrogation. Courts and

legislatures across our country have begun whittling away at workers' compensation carriers' subrogation rights, especially in construction settings. Sometimes this is done in the name of "reducing needless litigation" and sometimes it results literally from an ignorance of the philosophical and legal concept underlying subrogation. Perhaps the greatest irony, however, is the fact that states appear to be limiting third-party subrogation most severely in construction settings - the area of workers' compensation in which the average level of injury compensation payments is nearly double the level for all other industries combined.

In a noble effort to ensure that construction workers are covered by workers' compensation insurance, one way or the other, courts and legislatures are dangerously close to throwing out the baby with the bath water. Efforts to guarantee workers' compensation coverage in construction settings have resulted in a snowballing expansion of the exclusive remedy rule and a marked diminution in third-party subrogation opportunities in construction settings. This is most amazing when you consider the fact that the construction industries' share of workers' compensation costs is disproportionately high - nearly three times that of the non-farm-private-sector labor force. *Workers' Compensation and Other Costs of Injuries and Illnesses in Construction*, § 49 of the Construction Chart Book, Third Edition, September 2002.

Not only does this strange anomaly result in higher premiums and a higher cost of doing business for employers, it has some states moving to monopolistic coverage or state-created workers' compensation insurance, which ultimately affects you and me, the American taxpayer. Until the wheels are put back on the proverbial cart, however, it is important for subrogation professionals, underwriters, and claims handlers to understand a carrier's subrogation rights in all 50 states. This article will present a quick overview of current workers' compensation subrogation in construction settings.

Many states have begun passing laws which declare that an owner or contractor who contracts any part of a construction project to a subcontractor is liable for workers' compensation benefits to the employees of any such contractor or subcontractor. These laws then go on to conclude that the owner or contractor who ultimately provides workers' compensation coverage or benefits to the workers of such subcontractors may take advantage of the exclusive remedy rule and is immune from any suit filed by the worker. While this may appease conservative business owners, it also has an extremely squelching effect on the ability of businesses and insurance to subrogate and ultimately shift the liability for injuries to the party which actually is responsible for causing them.

With increasing frequency, construction projects are being insured through vehicles known as Consolidated Insurance Programs. A Consolidated Insurance Program (CIP) is commonly known as "wrap-around insurance". A CIP means that the project owner, or general contractor buys one policy to cover the entire project. All subcontractors are usually enrolled in the project. If the owner purchases the program, it is known as an Owner-Controlled Insurance Program (OCIP). With an OCIP, everyone working at the project site is covered under one master liability insurance policy. When the project is bid, each contractor subtracts out its line item for liability insurance and the owner receives a portion of the cost of the OCIP premium back in the form of lower construction costs. OCIPs typically provide coverage through substantial completion of construction plus a period of years thereafter, typically ten years. The benefits to the owner are significant because they guarantee that they will have coverage and force the limits they selected for the applicable statute, and they can be comfortable that any contractor setting foot on the site is covered.

OCIPs do pose some difficulties. All policy forms are manuscripted and are heavily negotiated, which can be expensive and time consuming. OCIPs are complicated policies with extremely long time horizons, and each participant (usually contractors) must be enrolled into the policy. This can be time consuming and occasionally confusing. One area of coverage which may or may not be included into OCIP is workers' compensation. Frequently, workers' compensation is included in the OCIP. When workers' compensation is rolled into an OCIP, it is

recommended that each party to the project waive their rights of subrogation against the other parties on the project. OCIPs have been around since the turn of the century. The American Institute of Architects took a stand against additional insured statuses when it revised its General Conditions form in 1997 and pushed a policy somewhat comparable to the OCIP policy known as the Project Management Protective Liability policy (PMPL). However, as of 2000, only one insurer was providing the PMPL policy and that is CNA Insurance Company. *OCIP Coverage -- Confusion Still Reigns,* by Donald Malecki, Rough Notes Magazine, October 2000.

The idea behind an OCIP policy is to provide exclusive remedy immunity to certain contractors and subcontractors on the construction site. Nevada is one of the few states which actually has legislated the effect which an OCIP will have on third-party workers' compensation subrogation. More are sure to follow, however, and a closer look is called for.

Under Nevada law, when an employer accepts the Industrial Insurance Act and an employee receives compensation thereunder, the employer is fully and completely insulated from all other liability accounts of the injury. *Santisteven v. Dow Chemical Co.*, 362 F. Supp. 646 (D.C. Nev. 1973), aff'd, 506 F.2d 1216; *Lipps v. Southern Nevada Paving*, 998 P.2d 1183 (Nev. 2000). In theory, if an employer is a participating employer within the Industrial Insurance Act, it is relieved from tort liability to an employee who is injured in the course and scope of his employment on a construction project. *Corrao Constr. Co., Inc. v. Curtis*, 584 P.2d 1303 (Nev. 1978). Notwithstanding other Nevada statutes which deal with the subject of "statutory employers" and "statutory employees", it may be argued that the principal contractor, and any other subcontractors or entities who are included in the OCIP, are "in the same employ" as a worker injured on a construction site, and therefore cannot be sued because the employee's exclusive remedy is the benefits he received under the OCIP workers' compensation policy. *Tucker v. Action Equip. & Scaffold Co., Inc.*, 951 P.2d 1027 (Nev. 1997).

A principal contractor is not liable for payment of any benefits to any injured worker if the contract between the principal contractor and independent contractor provides that the independent contractor will maintain such coverage, proof of such coverage is provided to the principal contractor, the principal contractor is not engaged in any construction project, and the independent contractor is not "in the same trade, profession, or occupation as the principal contractor." N.R.S. § 616B.639(1)(A-D). In an OCIP, the principal contractor has agreed to provide coverage and will be liable for such compensation benefits. The term "contractor" is synonymous with "builder". N.R.S. § 624.020(1). A "contractor" is defined under Nevada law as follows:

> *"A contractor is any person, except a registered architect or a licensed professional engineer, acting solely in his professional capacity, who in any capacity other than as the employee of another with wages as the sole compensation, undertakes to, offers to undertake to, purports to have the capacity to undertake to or submits a bid to, or does himself or by or through others, instruct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, railroad, excavation or other structure, project, developmental improvements, or to do any part thereof, including the erection of scaffolding or other structures or works in connection therewith. Evidence of the securing of any permit from a governmental agency or the employment of any person on a construction project must be accompanied by the Board or any court of this state is prima facie evidence that the person securing that permit or employing any person on a construction project is acting in the capacity of a contractor pursuant to the provisions of this Chapter."* N.R.S. § 624.020(2).

A contractor includes a subcontractor or speciality contractor, but does not include anyone who merely furnishes materials or supplies without fabricating them into, or consuming them in the performance of, the work of a contractor. A contractor includes a construction manager who performs management and counseling services on a construction project for a professional fee. N.R.S. § 624.020(4). A contractor is required to obtain a licence from the State of Nevada, which evidences a degree of experience, financial

responsibility, and general knowledge of the building, safety, health and lien laws of the State of Nevada. N.R.S. § 624.260(1). A principal contractor who is unlicenced still qualifies as a statutory employer of an independent contractor and its employees, so long as it is in the same trade, business, profession or occupation as the independent enterprise. *Oliver v. Barrick Goldstrike Minds*, 905 P.2d 168 (Nev. 1995).

The exclusive remedy rule in Nevada appears to be set forth into two separate statutes. N.R.S. § 616A.020; N.R.S. § 616B.612(4). Section 616A.020 provides in subsection (1) that workers' compensation is the exclusive remedy for an injured worker, except as set forth in Chapters 616A to 616D. The exclusive remedy statute also appears to extend the exclusive remedy rule which is provided to a principal contractor, with respect to any injury sustained by an employee of any contractor in the performance of the construction contract, to every architect, land surveyor or engineer who performs services for the contractor, the owner, or any "such beneficiary interested persons". N.R.S. § 616A.020(3). This statute also specifically says that the exclusive remedy provided by this section applies to the owner of a construction project who provides an OCIP pursuant to § 616B.710, *to the extent that the program covers the employees of the contractors and subcontractors who are engaged in the construction of the project.* N.R.S. § 616A.020(4). In Nevada, all employers, including principal contractors, may take advantage of the exclusive remedy rule. However, § 616B.603 now provides an exception to the general rule that principal contractors are statutory employers. N.R.S. § 616B.603(1). This section sets forth that a person is not an employer if he enters into a contract with another person or business which is an independent enterprise, and he is not in the same trade, business, profession or occupation as the independent contractor. *Billmayer v. Newmont Gold Co.*, 963 F. Supp. 938 (D. Nev. 1996). However, this exception does not apply when the principal contractor is licensed pursuant to Chapter 624. *Billmayer*, supra.

There is also a presumption of the existence of an employer/employee relationship which must be overcome. *Id.* It appears that an owner of a project who does not assume an additional status of being a principal employer or contractor, but is simply the owner, can be liable as a third party. *Simon Serv., Inc. v. Mitchell*, 307 P.2d 110 (Nev. 1957). However, the exclusive remedy rule does apply to the owner of a construction project who provides workers' compensation coverage for the project by establishing and administering a CIP pursuant to N.R.S. § 616B.710, *to the extent that the program covers* the employees of the contractors and subcontractors who are engaged in the construction project. N.R.S. § 616A.020(4). Also, where an owner functions as his own principal contractor, he will be deemed an "employer" under the Industrial Insurance Act. *Hosvepian v. Hilton Hotels Corp.*, 587 P.2d 1313 (Nev. 1978); *Frith v. Harrah South Shore Corp.*, 552 P.2d 337 (Nev. 1976). Notwithstanding that, merely being an owner is not sufficient to grant immunity. Such immunity attaches to an employer of labor, not simply the construction project owners. *Ortolano v. Las Vegas Convention Serv.*, 608 P.2d 1103 (Nev. 1980). However, it appears that if the owner does provide OCIP workers' compensation coverage, the owner will be considered an employer and the exclusive remedy rule will apply, at least to the extent that the program covers the employees of the contractors and subcontractors engaged in the construction project. N.R.S. § 616A.020(4). It should be argued by us that the architect, who is not covered under the OCIP workers' compensation coverage, is not "an employer" because he didn't provide compensation benefits through this program, and he cannot be considered an "employee" under the Act either.

Nevada subcontractors, independent contractors, and their employees are deemed employees of the principal contractor. N.R.S. § 616A.210. This is expressly limited by § 616B.603 if an independent enterprise is not in the "same trade, business, profession or occupation as the independent enterprise". N.R.S. § 616B.603. However, this may be limited to non-construction injury cases. *Tucker v. Action Equip. & Scaffold Co., Inc.*, 951 P.2d 1027 (Nev. 1997). Because no other area of insurance subrogation is more dependent on the vagaries of each state's laws than workers' compensation, it is important to have a basic understanding of how your subrogation rights might be limited within each state, in construction settings.

Work-related construction injuries are and will continue to be a significant area of concern for underwriters, claims handlers, and subrogation professionals. Understanding the vagaries of subrogation laws across 51 different jurisdictions is no easy task, but is an absolute necessity if your goal is to maximize your subrogation recoveries. There is no substitute for experience and continuing education. However, Matthiesen, Wickert & Lehrer, S.C. has a resource tool which may be of benefit for the claims professional in training. It can be found on our website at http://www.mwl-law.com/CM/Resources/WC-IN-CONSTRUCTION-SETTINGS.pdf, entitled *"Workers Compensation Subrogation In Construction Settings In All 50 States*". It summarizes the details of the laws in this area for every state, setting forth the hurdles to be overcome and the opportunities for recovery. Please feel free to print it off with our compliments and keep it close by for easy reference when confronted with the ubiquitous construction injury file which visits us all too often.

WORKERS' COMPENSATION SUBROGATION

WORKERS' COMPENSATION SUBROGATION IN VIRGINIA CONSTRUCTION SETTINGS

In Virginia, the applicable law depends on whether the potential third party is an "owner", "contractor", or "subcontractor", and whether the work to be performed is part of the "trade, business, or occupation" of the owner, contractor, or subcontractor. When an "owner" contracts with a subcontractor to perform work which is a part of the trade, business, or occupation of the owner, the owner is liable for compensation benefits to employees of the contractor it hired. The owner is then considered to be a "statutory employer" of the employees of the party it contracts with, and cannot be sued as a third party by the employees of the contractor for injuries they sustain in the course of performing that work. Va. St. § 65.2-302(A) (1999). Likewise, a "contractor" is also responsible for compensation benefits to the employees of any subcontractors down the chain and becomes a statutory employer immune from suit, provided that the work undertaken or contracted for is *not* part of the trade, business or occupation of the "owner" but *is* part of the trade, business or occupation of the "contractor". Va. St. § 65.2-302(B) (1999). Finally, when the subcontractor, in turn, contracts with still another person (sub-subcontractor but referred to in statute as simply "subcontractor") for the performance or execution by the sub-subcontractor of the whole or any part of the work undertaken by the subcontractor, then the owner or contractor becomes the statutory employer of the employees of that sub-subcontractor. Va. St. § 65.2-302(C) (1999).

These provisions are meant to prevent an owner, contractor, or subcontractor from escaping liability under the Act by the simple expedient of subcontracting away work, which is part of its trade, business, or occupation. Generally, an employee of a contractor cannot sue an owner which it is considered to be a "statutory employer", just as an employee of a subcontractor cannot sue an owner or contractor who are considered to be his or her "statutory employer." *Hipp v. Sadler Materials Corp.*, 180 S.E.2d 501 (Va. 1971). The status of being a "statutory employer" is governed by Va. St. § 65.2-302, which reads as follows:

Va. St. § 65.2-302. Statutory employer.

(A) When any person (referred to in this section as "owner") undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other

person (referred to in this section as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any worker employed in the work any compensation under this title which he would have been liable to pay if the worker had been immediately employed by him.

(B) When any person (referred to in this section as "contractor") contracts to perform or execute any work for another person which work or undertaking is not a part of the trade, business or occupation of such other person and contracts with any other person (referred to in this section as "subcontractor") for the execution or performance by or under the subcontractor of the whole or any part of the work undertaken by such contractor, then contractor shall be liable to pay to any worker employed in the work any compensation under this title which he would have been liable to pay if that worker had been immediately employed by him.

(C) When the subcontractor in turn contracts with still another person (also referred to as "subcontractor") for the performance or execution by or under such last subcontractor of the whole or any part of the work undertaken by the first subcontractor, then the liability of the owner or contractor shall be the same as the liability imposed by subsections A and B of this section.

(D)(1) Liability for compensation pursuant to this section may not be imposed against any person who, at the time of an injury sustained by a worker engaged in the maintenance or repair of real property managed by such person, and for which injury compensation is sought:

> *(a) Was engaged in the business of property management on behalf of the owners of such property and was acting merely as an agent of the owner;*
> *(b) Did not engage in and had no employees engaged in the same trade, business or occupation as the worker seeking compensation; and*
> *(c) Did not seek or obtain from such property's owners, or from any other property owners for whom such person rendered property management services, profit from the services performed by individuals engaged in the same trade, business or occupation as the worker seeking compensation.*

(2) For purposes of this subsection, "the business of property management" means the oversight, supervision, and care of real property or improvements to real property, on behalf of such property's owners.

(3) For purposes of this subsection, "property owners" or "property's owners" means (i) owners in fee of such property or (ii) persons having legal entitlement to the use or occupation of such property at the time of the injury for which liability is sought to be imposed pursuant to this section. Va. St. § 65.2-302.

While the rule regarding the immunity of a statutory employer seems fairly straightforward, there are usually questions regarding whether the work being performed at the time of the injury is a part of the "trade, business, or occupation" of the owner, contractor, or subcontractor. For example, there is a difference between the act of construction and the act of delivery of materials. A person delivering Sheetrock to a construction site is not considered to be performing work which is in the same trade, business, or occupation of the general contractor. *Burroughs v. Walmont, Inc.,* 168 S.E.2d 107 (Va. 1969). Likewise, a concrete supplier merely delivering concrete to a construction site, but not spreading or finishing the concrete, is not considered to be performing work within the same trade, business or occupation as the owner or contractor. *Hipp v. Sadler Materials Corp.,* 180 S.E.2d 501 (Va. 1971) The test as to whether something is within another's "trade, business, or occupation" is not whether the activity is useful, necessary, or even absolutely indispensable

to the other person's business, since, after all, this could be said of practically any repair, construction or transportation service. The test (except in cases where the work is obviously a subcontracted fraction of a main contract) is whether this indispensable activity is, in that business, *normally* carried on through employees rather than independent contractors. *Turf Care, Inc. v. Henson*, 657 S.E.2d 787 (Va. App. 2008).

Any party deemed under this law to be a "statutory employer" and becomes obligated to pay workers' compensation benefits for its "statutory employees" has a right of indemnity over any party who should have been liable to pay compensation to the worker. Va. St. § 65.2-302(C) (1999). Each party responsible for compensation benefits pursuant to this law becomes a "statutory employer", and may not be sued as third parties via the exclusive remedy rule. *Jones v. Commonwealth of Virginia,* 591 S.E.2d 72 (Va. 2004). In addition, where the defendant in a suit brought by an injured employee of a general contractor is a subcontractor engaged in an essential part of the work which the general contractor had to do, such that the defendant was no stranger to the work to which the plaintiff's employer was engaged, the defendant is not considered a third party who could be sued in a third-party action. *Whalen v. Dean Steel Erection Co.*, 327 S.E.2d 102 (Va. 1985), appeal dism'd, 106 S.Ct. 33 (1985); *Clean Sweep Prof'l Parking v. Talley*, 591 S.E.2d 79 (Va. 2004).

If you should have any questions on workers' compensation subrogation in construction settings regarding Virginia or any other state, please contact Gary Wickert at gwickert@mwl-law.com.

WORKERS' COMPENSATION SUBROGATION

OCIP PROTECTION ESTABLISHED IN TEXAS

Entergy Gulf States v. Summers, 282 S.W.3d 433 (Tex. 2009)

Owner-Controlled Insurance Programs (OCIP) have recently entered the subrogation picture in Texas. Also known as Owner-Provided Insurance Programs (OPIP) or "wrap-up insurance", an OCIP allows coverages for multiple insureds to be bundled together, or "wrapped up" into one, consolidated insurance coverage. The "owner" (or developer, general contractor, whatever the case may be), purchases it to cover the entire project including all contractors and subcontractors. The owner then either requires that the contractor lower his bid by deducting the estimated cost for insurance the contractor would normally pay for a job, or the owner requires them to itemize their bid to show how much of the bid is estimated as insurance costs, which the owner then deducts from the bid. Most commonly, OCIP policies focus on General Liability, but they can easily be tailored to cover Workers' Compensation, Employers' Liability and Excess or Umbrella Liability. In addition, an OCIP can include Builder's Risk, Professional Liability for design professionals, and Environmental Liability insurance coverages.

In 2009, the Texas Supreme Court decided the case of *Entergy Gulf States v. Summers.* It stretched the bounds of the exclusive remedy rule by providing extraordinary exclusive remedy protection to a property owner (Entergy) who provided workers' compensation for an on-site independent contractor (IMC) through an OCIP. Entergy contracted with IMC to assist in the performance of certain maintenance, repair and other technical services at its various facilities. The parties agreed that Entergy would provide, at its own cost, workers' compensation insurance for IMC's employees through an OPIP, or OCIP, in exchange for IMC's lower contract price. Entergy complied with its obligation under the agreement by purchasing workers' compensation insurance covering IMC's employees. John Summers, an IMC employee, was injured while working at Entergy's Sabine Station plant. He applied for, and received, benefits under the workers' compensation policy purchased by Entergy. He then sued Entergy for negligence. Entergy moved for and was granted summary judgment on the ground that it was a statutory employer immune from common-law tort suits.

The Supreme Court ultimately held that property owners who purchase OCIP insurance on their projects may benefit from the exclusive remedy protection usually reserved for employers, rendering them immune from suit by employees of an independent contractor who has collected workers' compensation benefits under the program. While this decision in Texas established this subrogation-unfriendly OCIP protection in Texas for the first time, it is hardly a new concept in American workers' compensation subrogation jurisprudence. For many years, the State of Nevada has protected their casino-building construction industry by establishing a complicated set of laws which protect owners of construction projects providing OCIPs which include workers' compensation coverage for the many subcontractors who might be injured on the job site.

2009 RECOVERIES MADE BY MATTHIESEN, WICKERT & LEHRER, S.C.

Each year Matthiesen, Wickert & Lehrer, S.C. meticulously tracks its recoveries during the course of the year. 2009 was a very good year, resulting in recoveries and credits of more than $25 million for our clients, spread over the 481 files we handled and closed during the year. We look forward to the opportunity of including your recoveries in our totals for 2010. Please let us know if we can be of assistance to you in maximizing your subrogation recoveries in the coming year.

UPCOMING EVENTS.....

February 23, 2010 - Gary Wickert presented MWL's first live webinar, entitled *"WC-101, Basics of Workers' Compensation Subrogation*". The recorded version can be found on our website under Seminars/Webinars. For those who attended this live webinar, we were approved in Texas for two hours of CE credit, so if you are interested in obtaining CE credits in Texas for this webinar, please contact jbreen@mwl-law.com.

April 20, 2010 - Gary Wickert will present a live 90-minute webinar, entitled *"Introduction to Fire and Casualty Subrogation"* at 10:00 a.m. (CST). A registration link will soon be on our website homepage but you can register now by clicking on the "Register Now" button to the right.

April 27-30, 2010 - Gary Wickert will be presenting at the 2010 NOPLG Conference in Savannah, Georgia. He will be presenting "*Recent Developments In Workers' Compensation Subrogation*". For more information on this conference, please go to https://www.signup4.net/public/ap.aspx?EID=2008838E&OID=147.

May 11-14, 2010 - MWL will be exhibiting at the 5th Annual Claims Education Conference being held in New Orleans, Louisiana. Jamie Breen will be at our exhibit booth so stop by if you plan on attending this conference. For information on this conference, please go to http://www.claimseducationconference.com.

November 10-11, 2011 - MWL will be exhibiting at the19th Annual National Workers' Compensation and Disability Conference Expo in Las Vegas, Nevada. Jamie Breen will be at our exhibit booth so stop by if you plan on attending this conference. For information on this conference, please go to www.WWConference.com.